

IN THE MATTER OF AN ARBITRATION

BETWEEN:

PUBLIC HEALTH SUDBURY & DISTRICTS

(the “Employer”)

AND

ONTARIO NURSES’ ASSOCIATION

(the “Union”)

**AND IN THE MATTER OF A REQUEST FOR AN EXEMPTION FROM A
REQUIREMENT TO BE VACCINATED BASED ON CREED UNDER THE
ONTARIO HUMAN RIGHTS CODE**

ARBITRATOR

ROBERT J. HERMAN

APPEARANCES

FOR THE UNION

**SEVDA MANSOUR
SANDY DONALDSON
RENEE LEFEBVRE
JENNIFER DEL RICCIO
GRIEVOR**

FOR THE EMPLOYER

**DARYN JEFFRIES
MATTHEW CANNING
FRANCE QUIRION
TROY HASLEHURST**

**HEARINGS WERE HELD BY ZOOM VIDEOCONFERENCE ON MARCH 23
AND 24, APRIL 13, AND MAY 18, 2022**

AWARD

1. The Employer, Public Health Sudbury & Districts, issued a policy regarding COVID-19 that required vaccination by all staff, subject to exemptions on medical or Human Rights grounds. The grievor claimed an exemption on the basis of “creed”, within the meaning of the Ontario *Human Rights Code* (the “Code”), and filed a grievance when her exemption request was denied.
2. It is agreed I have jurisdiction. As agreed by the parties, the name of the grievor and her pastor are not used, in order to preserve the grievor’s anonymity.
3. The parties filed an Agreed Statement of Fact (“ASF”) and an ASF Addendum. The grievor also testified. As agreed in the ASF, this Award will address only the issue of whether the grievor was discriminated against in the refusal of the Employer to allow her requested exemption, and in her subsequent suspension and termination.

The Facts

4. The ASF reads:

AGREED STATEMENT OF FACTS

Facts

Background

1. The COVID-19 pandemic is an ongoing global pandemic of coronavirus disease 2019 (i.e., COVID-19) caused by a virus known as severe acute respiratory syndrome coronavirus 2 (“SARS-CoV-2”).

2. In response to the growing global spread of COVID-19, the World Health Organization declared a Public Health Emergency of International Concern on or about January 30, 2020 and a pandemic on March 11, 2020. As of February 2022, the pandemic has caused more than 412 million cases and 5.81 million deaths, making it one of the deadliest in history.

3. Since the start of the COVID-19 pandemic, several pharmaceutical companies have developed COVID-19 vaccines that have been authorized for use in Canada. These vaccines provide acquired immunity against SARS-CoV-2. A number of organizations and public health agencies such have stated that these vaccines are safe and effective at preventing severe disease, hospitalization, and death as well as the emergence of SARS- CoV-2 variants.

4. Sudbury & District Health Unit, operating as Public Health Sudbury & Districts (“PHSD”) is a public health agency located in Sudbury, Ontario.

5. At the relevant time, the Grievor was employed as a Public Health Nurse at PHSD.

6. Prior to the COVID-19 pandemic, PHSD already had policies with respect to immunization requirements for its employees.

PHSD’s COVID-19 Vaccination Policy

7. As the pandemic has unfolded, the Ontario government has required a number of employers in the healthcare sector to implement policies related to the immunization of employees against COVID-19. Many organizations, including healthcare organizations, have decided to implement vaccination policies above and beyond the minimum requirements established by the Ontario government.

8. In August 2021, PHSD developed a policy regarding the COVID-19 vaccine [TAB 1].

9. PHSD’s vaccination policy was implemented in order to achieve the following objectives, as stated in the policy:

- a. Protect employees, students, volunteers, and contractors;
- b. Protect clients who interact with and receive services from Public Health Sudbury & District;
- c. Reduce transmission and absenteeism in the workplace;
- d. Protect family, colleagues, and community members, including those who may be at high risk for serious illness related to infection;

- e. Minimize the risk of transmission and outbreaks in the workplace and protect the ability of the organization to provide and maintain services;
 - f. Ensure data is available on immunization rates to assist with decision making on service resumption/discontinuation; case, contact and outbreak management; and infection prevention and control practices as applicable;
 - g. Demonstrate leadership on COVID-19 prevention in the community and the workplace; and
 - h. Facilitate PHSD's ability to provide thorough case management and contact tracing (as required under the *Health Protection and Promotion Act*) in order to prevent and more effectively manage outbreaks of COVID-19, when and if they occur.
10. On August 25, 2021, at an all-staff meeting, employees were informed of PHSD's COVID-19 Vaccination Policy by Dr. Penny Sutcliffe, Medical Officer of Health and Chief Executive Officer.
11. On August 27, 2021, Troy Haslehurst, Human Resources Manager, provided employees with a copy of the policy by email [TAB 2].
12. The initial version of the policy required employees to:
- a. Provide proof of vaccination;
 - b. Provide proof of a medical exemption; or
 - c. Complete an educational program regarding the COVID-19 vaccine.
13. The policy stated, among other things, that it would be applied in accordance with the Ontario *Human Rights Code* (the "Code").
14. Further, the policy stated that it would be amended as the status of the pandemic changed, including but not limited to any changes to applicable legislation, scientific or public health advice and direction.
15. PHSD's COVID-19 Vaccination Policy evolved as the COVID-19 pandemic unfolded. Ultimately, PHSD required all employees to be fully vaccinated unless a legitimate medical exemption applied, or an exemption was otherwise required by the *Code* [TAB 3].

The Grievor's Exemption Request

16. PHSD's COVID-19 Vaccination Policy took effect on September 1, 2021. Employees were initially required to comply with the policy by September 17, 2021 [TAB 2].

17. Employees were reminded of the compliance deadline on September 1 and 10, 2021 [TAB 4].

18. On September 17, 2021, the Grievor submitted a COVID-19 Vaccination Declination Form, attesting that she had reviewed the COVID-19 vaccination education program and declined to receive the vaccine [TAB 5]. The Grievor also provided a commissioned affidavit, sworn by her on September 15, 2021, which stated, in its entirety:

Pursuant to grounds protected under the Ontario Human Rights Code, I hold a valid exemption to COVID-19 vaccination.

In accordance with the Ontario Human Rights Code, every person has the right to equal treatment, without discrimination because of age, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, marital status, family status or disability.

Exemption rationale has been verified and validated today.

19. In or around the middle of September 2021, PHSD determined that it would require all staff to be fully vaccinated against COVID-19, unless an exemption under the policy applied. PHSD decided that its remaining unvaccinated employees would be subject to a leave of absence followed (potentially) by termination of employment if they did not become fully vaccinated.

20. On September 19, 2021, Nicole Proulx, Divisional Administrative Assistant, sent an email to all employees containing a revised version of the COVID-19 Vaccination Policy [TAB 6].

21. On September 20, 2021, Dr. Sutcliffe sent an email to all employees to advise that the deadline for compliance with the Policy was extended to September 24 at 4:00 p.m. [TAB 7]. Dr. Sutcliffe's email expressly stated that if an employee did not respond by the extended deadline, it would be assumed that they were not vaccinated, and the policy would be applied to them accordingly.

22. On September 24, 2021, Dr. Sutcliffe sent another email to all employees reiterating the expectation that all eligible employees be fully immunized against COVID-19 [TAB 8]. The email stated:

At this time, we will be moving forward with next steps related to the implementation of the policy. Individuals who by 4 pm today are not in compliance with the policy or who have submitted declination forms will be placed on leave without pay by end of day Friday,

October 1, 2021, if by then, their status with respect to the policy has not changed. Under exceptional circumstances, the Medical Officer of Health may approve exceptions to this outcome. Staff may elect to request vacation pay, time off in lieu of overtime (if available) pay or a leave of absence without pay in accordance with the current provisions in place either by policy and/or within the applicable collective bargaining agreements. These will be subject to a review of operational requirements. All those impacted will be sent an email advising them later today.

23. Later that day, on September 24, 2021, Ms Haslehurst emailed employees, including the Grievor, who had submitted a COVID-19 Vaccination Declination Form [TAB 9]. The email stated:

At this time, we will be moving forward with next steps relating the implementation of the policy. If you have submitted a declination form or are not in compliance with the policy by end of day next Friday, October 1, 2021, you will be placed on leave without pay. You may elect to request vacation pay (if available), time off in lieu of overtime pay (if available) or a leave of absence without pay in accordance with the current provisions in place either by policy and/or within the applicable collective bargaining agreements. These will be subject to a review of operational requirements.

You may return to work once you have provided proof of COVID- 19 vaccine and the COVID-19 Vaccination Attestation Form as outlined in the policy and copied here for ease of reference;

- If the individual has only received the first dose of a two- dose COVID-19 vaccination series approved by Health Canada, proof that the first dose was administered and, as soon as reasonably possible, proof of administration of the second dose; or

- Proof of all required doses of a COVID-19 vaccine approved by Health Canada.

Non-compliance with the COVID-19 Immunization Policy may result in a meeting with the employee, including their Union representative (if applicable), and is subject to possible discipline, up to and including termination. Claims submitted under the Human Rights Code (i.e. based on medical exemption or creed) will be reviewed and assessed for accommodation. Philosophical objections and/or personal principles are not a protected ground under the Ontario Human Rights Code.

24. The Grievor replied to Ms Haslehurst's email on September 24, 2021, requesting confirmation that the affidavit she had provided on September 17, 2021 had been received **[TAB 10]**.

25. On September 27, 2021, Ms Haslehurst wrote to the Grievor. **[TAB 11]**.

26. On September 29, 2021, Ms Haslehurst emailed the Grievor a finalized copy of the Human Rights Exemption for COVID-19 Vaccination Form **[TAB 12]**.

27. On October 1, 2021, Ms Haslehurst notified employees who were not compliant with the COVID-19 Vaccination Policy that they were being placed on an unpaid leave.

28. On October 1, 2021, the Grievor provided a completed Human Rights Exemption for COVID-19 Vaccination Form on that date with attachments **[TAB 13]**.

29. Ms Haslehurst replied the same date, confirming receipt of the Grievor's documents and advising that the Grievor would not be placed on an unpaid leave and could perform remote work (no contact with others) while PHSD reviewed the Grievor's exemption request **[TAB 14]**.

30. On October 5, 2021, Ms Haslehurst sent an email to the Grievor advising that PHSD had reviewed her exemption request and that her request was denied on the basis that an employee's singular belief against vaccinations does not amount to creed within the meaning of the *Code* and placed the Grievor on an unpaid leave of absence **[TAB 15]**.

31. The Grievor was one of only three employees (out of a total of approximately 559 PHSD employees) who PHSD considered to have violated the COVID-19 Vaccination Policy by failing to receive the vaccine.

She was the only ONA employee to submit a COVID-19 Vaccination Declination Form.

32. On October 15, 2021, ONA filed Grievance No. 21-08 on the Grievor's behalf [TAB 16].

33. On November 4, 2021, PHSD received a letter from a lawyer representing the Grievor [TAB 17]. The lawyer's letter enclosed an October 22, 2021 letter from the Grievor, which stated that the Grievor could not receive the COVID-19 vaccine because she is a believing, practicing, and observant Roman Catholic [TAB 17]. The November 4, 2021 lawyer's letter also enclosed an October 22, 2021 letter from Reverend [X]. [TAB 17].

34. On November 9, 2021, PHSD sent a letter to the Grievor advising that PHSD had reviewed the information provided on November 4, 2021 and its decision remained unchanged. The letter reiterated that the Grievor was on an unpaid leave for failing to comply with the COVID-19 Vaccination Policy [TAB 18].

35. Fetal cell lines are cells that are grown in a laboratory. They descend from cells taken from fetuses aborted in the 1970s and 1980s that have since multiplied into many cells over the past four or five decades creating fetal cell lines. Current fetal cell lines are thousands of generations removed from the original fetal tissue. They do not contain any tissue from a fetus. The Moderna (Spikevax) and Pfizer (Comirnaty) vaccines used the fetal cell line HEK 293 in the very early stages of research and development. It was not used to make these vaccines.

<https://immunizebc.ca/ask-us/questions/do-covid-19-vaccines-contain-aborted-fetal-cells>

<https://www.ottawapublichealth.ca/en/public-health-topics/frequently-asked-questions-about-covid-19-vaccination.aspx#Is-it-true-that-the-COVID-19-vaccines-contain-elements-from-a-human-fetus>

Question for the Arbitrator

The parties agree that the question to be determined by the Arbitrator at this time is whether the Grievor was discriminated against on the basis of the *Code* protected ground of creed, when her request for an exemption from PHSD's COVID-19 Vaccination Policy was denied under the Employer's Policy. For greatest clarity, if the arbitrator determines that the Grievor was not discriminated against, ONA reserves the right to challenge the Employer's Policy more generally (and has filed a policy grievance re same which is currently being held in abeyance), and if the arbitrator determines that the Grievor was *prima facie* discriminated against, the Employer

reserves the right to call evidence and make arguments regarding whether and/or how the grievor could be accommodated in all the circumstances. The parties ask that the Arbitrator be seized in respect of either of these events.

(emphasis added)

5. The ASF Addendum reads:

ADDENDUM TO THE AGREED STATEMENT OF FACTS

The Parties agree that the following medications were invented/ discovered and put on the market before HEK 293 (the Fetal Cell Line at issue) came into existence in the 1970s. Specifically, the following facts are stipulated:

- Acetaminophen (Tylenol) – first prepared in 1878 and marketed in 1950 under the name Triagesci. Tylenol is the brand name and was introduced in 1955

<https://www.acs.org/content/acs/en/molecule-of-the-week/archive/a/acetaminophen.html>

<https://www.britannica.com/science/Tylenol>

- Ibuprofen (Advil) – discovered in the 1960s and was available by prescription in 1969

<https://www.newworldencyclopedia.org/entry/Ibuprofen>

<https://www.bbc.com/news/health-34798438>

- Aspirin – first created in 1897 and synthesized in 1899

<https://www.aspirin-foundation.com/history/the-aspirin-story/>

https://en.wikipedia.org/wiki/History_of_aspirin

- Benadryl (diphenhydramine) – discovered in 1940. Benadryl was approved by the FDA for prescription use in 1946 and became OTC in 1980s

<https://www.britannica.com/science/diphenhydramine>

<https://en.wikipedia.org/wiki/Benadryl>

- TUMS – created in 1928 and introduced to the public in 1930

<https://www.tums.com/about/#:~:text=Created%20in%201928%20by%20pharmacist,to%20provide%20fast%2C%20heartburn%20relief>

6. With respect to the grievor's testimony, she was consistent and straightforward in most of her testimony and in her recollections of most matters, but was somewhat vague and uncertain when asked about some issues, such as her awareness or understanding of the efficacy of the COVID-19 vaccines and when she had become aware that fetal cell lines had been used in the research or development of any of the medicines that she or her family take on occasion. Except in areas where the grievor's evidence was vague or her recollections uncertain, I found the grievor to be credible and her evidence to be credible.

7. The grievor is a nurse who worked in health promotion for the Employer and was involved in communicating with members of the public about COVID-19 and COVID-19 vaccinations. She began as a contract employee with the Employer in October 2020 and became a full-time employee as of September 2021. She was placed on unpaid leave of absence, and subsequently terminated, for failure to get vaccinated, as required by the Employer's vaccine mandate. The grievor had asked for an exemption on the basis of creed, which was denied. The basis of her creed-based objection to the COVID-19 vaccines was that they used fetal cell lines in their research, and to receive one of the vaccines in these circumstances would be to condone, cooperate with, or participate in abortion.

8. During her early years, the grievor was a devout Protestant. When she was around 26 years old, she met her husband, a devout Roman Catholic. Approximately 17 years ago, the grievor converted to become Roman Catholic. About 6 or 7 years ago, searching for a more traditional and orthodox approach to Roman Catholicism, the grievor and her husband were attracted to the Latin Mass part of the Church, and participated in establishing a Latin Mass community in Sudbury. The Latin Mass

community takes a more traditional and more orthodox approach in worship and in life than does the more mainstream Roman Catholic Church. There is no doubt that the grievor is a devout Catholic and a devout member of the Latin Mass community, nor any doubt that the grievor in many respects conducts her life in a manner she considers consistent with her religion and her Latin Mass community.

9. Members of the Latin Mass community as matters of doctrine and belief oppose contraception and abortion, and support what they refer to as the “natural law”. With respect to taking a COVID-19 vaccine, Latin Mass neither prohibits members from taking the vaccines nor requires that they do so. Rather, it requires that individual members make their own decision as to whether they will get vaccinated, consistent with the Latin Mass view that using contraception and abortion are against God’s will and the rules of the Church.

10. The grievor first became aware of fetal cell lines (cf. ASF, para. #35) being used in the development of medicines and vaccines many years ago, although she cannot remember when with any precision. About 11 years ago, the grievor received a vaccine for measles that used fetal cell lines in the research and development of the vaccine, although it is not apparent that she was aware of this at the time. As well, some of the medicines she and her family have taken over the years, including medicines that must be ingested, were developed or researched using fetal cell lines. The grievor was aware in general terms that these medicines might have used fetal cell lines in their research and development, but was not aware of the details of their use. It is not clear how similar in nature was the use of fetal cell lines in the development of these medicines. At no time, neither before or after the issuance of the Employer’s vaccine policy, did the grievor

investigate how fetal cell lines had actually been used with respect to any of these medicines. Nor, before or after the issuance of the vaccine policy, has the grievor decided that she or her family should stop using any of these medicines. The only medicines or drugs the grievor appears to have investigated in terms of whether fetal cell lines were used in their development or research are the COVID-19 vaccines in issue here.

11. As to why the grievor has not conducted any such investigations with respect to medicines she and her family take, the grievor testified that there is always a certain amount of evil in the world, and one can't scrutinize everything. As she put it, to take things to that level, she would have to find a doctor on the same page as her, and perhaps would be unable to drive because tires use animal fat. She testified she generally only scrutinizes things involving her everyday life when they involve her personally or when she has to take something into her body, and she has never before been in the position where she was forced to take a medicine or vaccine or lose her job. She says that she does not typically take medicines so there was no reason to investigate them, and it is different when medicines have to be taken to assist in recovery from an illness.

12. The grievor has also administered vaccines to others as part of her job duties as a nurse, but has not investigated or considered whether the vaccines she has been giving were derived in any way from fetal cell lines. At least some of those vaccines used fetal cell lines in their research or development. She explained that she did not do so because she was not being asked to take those vaccines into her body.

13. Other aspects of the grievor's life potentially raise issues with respect to contraception or abortion. The grievor is covered by an employee benefit plan, and that plan provides coverage for contraceptive devices. The grievor testified that she declined her benefit plan, as her husband's plan with another employer covers her, but it appears she is in fact covered by the plan, although it does not appear that she has made any claims under the plan. When asked why belonging to a plan that provided contraceptive coverage was acceptable, she again stated that there is a material difference when she is being asked to put something in her body.

14. Although the grievor's work duties included communicating with the public about COVID-19 and the COVID-19 vaccines, and although eligible members of the public were being encouraged generally by all levels of government and public health authorities to get vaccinated at least by early 2021, the grievor did not herself get vaccinated. She continued to decline to do so for many months prior to her learning that fetal cell lines were related in some way to the COVID-19 vaccines. Her initial refusal to get vaccinated cannot therefore have been related to any concern that getting vaccinated would somehow be condoning, cooperating with, or participating in abortion. More likely, her initial refusal was at least in part because of doubts she has about the efficacy and impact of the vaccines. Even now she remains unsure whether vaccines materially prevent the spread of COVID-19, and whether the COVID-19 vaccines materially reduce the probability of infected persons dying from the infection.

15. The grievor expected that the Employer would issue a vaccine policy, and that it would include a requirement to be vaccinated, and as a result in late July 2021 she began inquiring about whether the available COVID-19 vaccines utilized fetal cell lines. This

was about a month before the Employer issued its vaccine policy. The grievor learned that fetal cell lines had been used in some manner and at some point in all the approved COVID-19 vaccines, although her knowledge of the details of the use of fetal cell tissue was limited. She concluded that this would create a moral issue for her, and that she had to decide whether to have a job or a relationship with God.

16. Although (at least) two of the approved COVID-19 vaccines do not themselves contain or use fetal cell lines (cf. ASF para. #35), the grievor does not fully acknowledge this. As she testified, “perhaps she didn’t know this” and she “wasn’t sure if this was true”.

17. On September 17, 2021, after the issuance of the Employer’s vaccine policy, the grievor wrote to the Employer, attesting that she was not vaccinated and seeking an exemption on the basis of her rights under the *Code*. She had retained a lawyer to assist her in filing her request. Her request did not mention creed or any other particularized ground for the exemption, nor was there any reference to her specific religious beliefs or her affiliation with Latin Mass or to fetal cell lines and abortion. In her testimony, she stated that she sought the exemption because the vaccines used fetal cell lines in their research and development, and as a Catholic she could not participate in or condone this and it would be sinful for her to do so.

18. The grievor filed further material in support of her request for an exemption on the basis of creed by email on October 1, 2021. This material also did not indicate that her exemption request was based upon being Roman Catholic, nor does she mention the Latin Mass or concerns about abortion or fetal cell lines, but it does state that she is a

member of a “minority faith group/creed and I also hold a worldview and way of being that embraces natural law”. Most of the letter sets out the grievor’s recital of what she considers the law on this issue and her assertions as to why she clearly qualifies for the exemption. One of the forwarded attachments was a letter from the pastor of her Latin Mass congregation, which stated that the grievor was a member of this minority faith community and that with respect to COVID-19 vaccines, the great majority of this community steadfastly oppose getting vaccinated, which the pastor stated is within their purview and in accordance with the precepts of the faith.

19. On October 5, 2021 the grievor’s request for an exemption was denied.

20. That same day, the grievor requested that she be allowed to work until she could obtain additional documentation. This request was denied.

21. On October 15, 2021, a grievance was filed over the denial of the grievor’s request for an exemption.

22. The grievor’s lawyer forwarded a third set of material in support of her request on November 4, 2021. By this time, consistent with the vaccine policy, the grievor had been placed on unpaid leave of absence because of her failure to get vaccinated. In the covering letter, the grievor provided details of the basis for her exemption, advising that she was an observant Roman Catholic who attended Latin Mass, and that accepting the currently approved vaccines would seriously endanger her relationship with God. The grievor also stated that the currently approved COVID-19 vaccines “used fetal cell lines in their research, development, production and/or manufacturing”, and that as a Catholic she believed that abortion is a form of murder, and that accepting the vaccines would be

condoning the use of fetal cell lines and therefore condoning abortion. The filed material provided references to various parts of the Bible that the grievor asserted related to life starting at the moment of conception and that indicated that abortion is consequently a form of murder. She noted that her strong disapproval of abortion is an essential and significant part of her religion/creed, and stated that she believed that taking the vaccine would amount to condonation of abortion, as well as partaking in the sin of those who aborted the fetuses in the first place. The grievor wrote that she has no choice but to reject the vaccines to protect her fundamental rights and her relationship with God.

23. Attached to her letter was a second letter from the pastor of her Latin Mass community. He stated that the grievor sincerely held the beliefs outlined in her letter, and that the endorsement of the vaccines was not shared by all leaders of the Catholic Church, that it is not Catholic dogma that one be vaccinated, and that the Church permitted variations among members. He also wrote that the grievor's relationship with God would be seriously damaged if she received a COVID-19 vaccine.

24. On November 9, 2021, the Employer responded that the additional information provided did not lead it to grant the request. In accordance with its vaccine policy, her employment was subsequently terminated (whether the vaccine policy itself is unreasonable and cannot stand is not an issue in this phase of the proceeding).

25. With respect to the position of the Catholic Church on the issue of taking a COVID-19 vaccine, on December 21, 2020, the Congregation for the Doctrine of the Faith issued a Note, approved by the Pope, that stated that it was morally acceptable to take the vaccine, and explaining why doing so would not be inappropriate cooperation

with the evil of abortion as the connection with fetal tissue was too remote. The Note stated that a member of the Church was not obligated to get vaccinated but was free to do so without concerns about supporting abortion. On March 9, 2021, the Canadian Conference of Catholic Bishops issued a “Note on Ethical Concerns Related to Currently Approved COVID-19 Vaccines”, which it subsequently clarified on March 11, 2021. In the clarification it stated that “Catholics are invited to get vaccinated, both in keeping with the dictates of their conscience and in contributing to the common good by promoting the health and safety of others.” The clarification also noted that all vaccines currently approved could be licitly received by Catholics. On or about August 18, 2021, the Pope issued a statement that urged Catholics to get vaccinated against COVID-19, stating that doing so was an “act of love”. In January 2022, the Pope expanded upon this statement to say that health care was a “moral obligation”. The grievor was aware of these statements from the Pope.

26. The grievor declined to follow the Pope’s urging that Catholics be vaccinated. She testified that she was not required to follow the Pope’s entreaty since his statements were not issued *ex cathedra*, or from the Throne. Had they been, she acknowledges, the Pope would have been acting in his infallible capacity, and the grievor would have had to comply with his request that she get vaccinated. As it was, the grievor testified, the Pope’s exhortations did not represent official Church doctrine, and the Church and its Latin Mass community still permitted members to make individual decisions about getting vaccinated. The grievor testified that her conscience precluded her from getting vaccinated because of the use of fetal cell lines in researching and developing the

vaccines, because to do so would in her mind amount to condoning, cooperating with, or participating in abortion.

27. The grievor also testified to the negative economic impact upon her family of her being terminated.

28. The Ontario Human Rights Commission (the “Commission”) has issued a Policy on Creed (available at www.ohrc.on.ca) which includes the following:

4.1 What is creed?

Under the *Code*, creed includes, but is not necessarily limited to, "religious creed" or "religion.”¹ Given the evolving nature of belief systems over time and the need to apply a liberal and purposive interpretation to *Code* protections for creed, this policy does not provide a universal, "once and for all" definition of creed. However, the following characteristics are relevant when considering if a belief system is a creed under the *Code*. A creed:

- **Is sincerely, freely and deeply held**
- **Is integrally linked to a person’s self-definition and spiritual fulfilment**
- **Is a particular, comprehensive and overarching system of belief that governs one’s conduct and practices**
- **Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a creator and/or a higher or different order of existence**
- **Has some “nexus” or connection to an organization or community that professes a shared system of belief.**

(emphasis added)

29. On September 22, 2021, the Commission issued a Policy on COVID-19 vaccine mandates. This Policy included the following statement:

Personal preferences and singular beliefs not protected

The OHRC and relevant human rights laws recognize the importance of balancing people's right to non-discrimination and civil liberties with public health and safety, including the need to address evidence-based risks associated with COVID-19.

Receiving a COVID-19 vaccine is voluntary. At the same time, the OHRC's position is that a person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the *Code*. The OHRC is not aware of any tribunal or court decision that found a singular belief against vaccinations or masks amounted to a creed within the meaning of the *Code*.

While the *Code* prohibits discrimination based on creed, personal preferences or singular beliefs do not amount to a creed for the purposes of the *Code*.

(emphasis added)

30. Sections 5 and 11(1) and (2) of the *Code* read:

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

Constructive discrimination

11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

Idem

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that

the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Submissions

31. ONA submits that the real issue is whether the grievor has a bona fide belief in a creed, and whether that belief supports her exemption request. There is legally a three-part assessment in determining this, asserts ONA: whether creed is a characteristic protected under the Code, whether following her belief would have an adverse impact upon the grievor's employment, and whether there is sufficient nexus or relation between the first two factors.

32. ONA asserts that the grievor has a sincerely held belief in a creed that prevents her from getting vaccinated, because to do so would in her mind be contrary to her conscience and would be tantamount to condoning abortion, given the use of fetal cell lines in research for all of the COVID-19 vaccines. Even if the grievor's view is mistaken factually, ONA submits, since she sincerely believes it and it is consistent with the creed that she sincerely believes in and follows, she would still qualify for the exemption under the *Code*. ONA notes that the grievor's belief is shared by many in her religious community, as verified by her pastor, and given her sincere beliefs in her creed and what it demands of her, ONA maintains that it cannot be found that she merely holds a singular belief or made a personal choice. This remains so even though others in the Church hold a different view, including the Pope, as the Church continues to permit individual choice or actions concerning taking the vaccine. This is not a case, asserts

ONA, where the Pope in his infallible role has required that members be vaccinated nor where the official Catholic dogma requires vaccination, nor where the Pope or the Church have stated that members are morally obligated to get vaccinated. It would not in any event be determinative, ONA asserts, if the Pope or the Church did issue such a requirement, because the Latin Mass community permits members as a matter of faith to decline to take the vaccines.

33. With respect to “inconsistencies” in her conduct asserted by the Employer, ONA submits that the grievor is not part of the Employer’s benefit plan, and even if she is, she was not aware that it provided contraceptives, and further, belonging to such a plan is not the same as being required to inject into one’s body a vaccine that used fetal cell lines in its research. With respect to the grievor failing to inquire into medicines used by her and her family, ONA asserts this is not relevant to the matters in issue, as she did not take these medicines while aware that fetal cell lines were used in their development. In any event, it submits, all that can be discerned about these drugs is that some studies were done with fetal cell lines, and the relationship of these drugs to fetal cell line research cannot be clearly discerned and appears different than the relationship between fetal cell lines and the COVID-19 vaccines. ONA submits that if an issue with medicines was made known to the grievor, she would look into it. Further, the fact that she took a vaccine about 10 years ago occurred so long ago as to be too remote and of no relevance today.

34. As remedial relief, ONA asks for a declaration that the grievor was *prima facie* discriminated against, when her request for an exemption on the basis of creed was not granted, and asks that the matter then be remitted to the parties and that I remain seized.

35. The Union referred to a number of authorities, including the following: 407 ETR *Concession Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada, Local 414 (Black Grievance)* [2007] O.L.A.A. No. 34, 2007 CanLII 1857 (ON LA); *Baker v. St. Elizabeth Health Care*, 2016 HRTO 94; *Clipperton-Boyer v. RedFlagDeals.com* [2014] O.H.R.T.D. No. 1799; *Cybulski v. Canadian Corps of Commissionaires Ottawa Division* [2014] O.H.R.T.D. No. 312; *Heintz v. Christian Horizons* [2008] HRTO 22; *Huang v. 1233065 Ontario Inc. (c.o.b. Ottawa Chinese Senior Assn.)* [2006] O.H.R.T.D. No. 1; *Loblaws Supermarkets Ltd. v. United Food and Commercial Workers Local 1000A (Ferrentone Grievance)* [2012] O.L.A.A. No. 458; *Moore v. British Columbia (Education)* [2012] 3 S.C.R. 360; *Moore v. British Columbia (Ministry of Social Services)* [1992] B.C.C.H.R.D. No. 15; *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256; *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Barillari Grievance)* [2006] O.G.S.B.A. No. 176; *Peel Law Association et al. v. Pieters et al.* [Indexed as: *Peel Law Assn. v. Pieters*] [2013] 116 O.R. (3d) 81; *RC v District School Board of Niagara* [2013] HRTO 1382; *Peterborough Civic Hospital and Ontario Nurses' Association* [1981] O.L.A.A. No. 97; *Singh v. Workmen's Compensation Board Hospital and Rehabilitation Centre* [1981]; *Syndicat Northcrest c. Amselem*, 2004 SCC 47, 2004 CSC 47 [2004] Carswell Que 1543; *Tramm v. Porter Memorial Hosp.* [1989] U.S. Dist. LEXIS 16391; *Warford v. Carbonear General Hospital* [1988] CanLII 8940 (NL HRC)

36. The Employer responds that it does not dispute that the grievor is a devout Catholic and is firmly anti-abortion, and that being anti-abortion is part of her faith. However, it asserts, the fundamental question is whether the grievor sincerely believes

that using any of the COVID-19 vaccines derived from fetal cell lines in fact interferes with the practice of her faith, and/or whether her refusal to take any of the vaccines is part of an overarching set of beliefs that are consistent with her conduct or practices. One cannot conclude this is so, submits the Employer, because her actions in virtually every other context are inconsistent with her claim that her faith requires her to decline to get vaccinated for the reasons she has asserted. Rather, the Employer maintains, the grievor decided not to get vaccinated for reasons other than faith-based reasons, and then latched on to the “faith” rationale once she realized it might enable her to claim an exemption. The grievor may have a singular belief against using vaccines, asserts the Employer, but her unwillingness to get vaccinated is not connected to her faith.

37. The Employer notes that the vaccines were available from as early as December 2020, and even though governments, public health authorities, and employers were urging everyone to get vaccinated, the grievor did not get vaccinated. The grievor made the decision not to get vaccinated before she was aware of any connection between the vaccines and fetal cell lines, perhaps because she did not fully accept that the vaccines help reduce the spread of COVID-19, and the Employer asserts her initial refusal was clearly not connected to reasons of faith or her creed.

38. The Employer points to 13 “inconsistencies” in the grievor’s conduct. First, when the grievor learned years ago about fetal cell lines and their use in developing medicines, she took no steps then to inquire whether the medicines she and her family were taking had any connections to fetal cell lines, even though these medicines also had to be ingested. Second, the grievor was sceptical of vaccines and opposed to getting vaccinated before she had any knowledge that the vaccines had any connection to fetal

cell lines. Third, although firm in most of her views and testimony, she was repeatedly vague and evasive in questions about her views of the efficacy of the vaccines. Fourth, upon learning of the fetal cell line connection to the vaccines in general terms, she did no investigation into the actual relationship of fetal cell lines to the vaccines, content to rely upon only a limited understanding that they had been used in researching the vaccines. Fifth, the grievor repeatedly testified that taking the vaccines would be tantamount to condoning, cooperating with, or participating in abortions. However, taking a vaccine that does not itself contain fetal cell lines and where the use of fetal cell lines only occurred many generations ago during the research and development phases of the vaccine, cannot reasonably be considered to be condoning, cooperating with or participating in abortions. Sixth, if the grievor had real concerns about condoning, cooperating with, or participating in abortions through her use of the vaccines, she would have inquired into the use of fetal cell lines in other areas of her life, such as whether her work benefit plan was funding contraceptives or whether certain institutions supported abortions or whether any other products utilized fetal cell lines for research, yet she did not. The Employer asserts that the single thing she looked at with respect to fetal cell lines or the support of abortion was the vaccines, and that is because she was already opposed to taking them for reasons unrelated to creed. Seventh, both before and after the grievor recently learned about the connection of the vaccines with fetal cell line research, she took no steps to inquire whether other products she and her family were ingesting, such as the medicines they took, were similarly connected. Eighth, the grievor acknowledges that her creed requires the balancing of interests and weighing of competing moral interests, yet she gives no weight to the fact unvaccinated persons

present greater risks to the health of others. Ninth, she gives no weight to the Pope's exhortation that on moral grounds Catholics should get vaccinated. Tenth, as a public health nurse the grievor is charged with promoting public health as a moral good, yet she jeopardizes this with her own behaviour. Eleventh, the grievor's creed and opposition to abortion are based upon the natural law and the right to life, yet the grievor's stance puts lives at greater risk. Twelfth, the grievor has administered to others vaccines that are connected to fetal cell lines, but objects only if she herself is asked to get vaccinated. Thirteenth, the grievor has herself taken vaccines in the past that have connections to research using fetal cell lines, without investigating whether they have used or do use fetal cell lines.

39. The Employer submits that the letters from the pastor of the Latin Mass community indicate that refusal to get vaccinated is a personal choice, and that nothing in his letters state that it is a requirement that members not get vaccinated. There is no evidence, the Employer asserts, that the grievor would get vaccinated even if the vaccines had not used fetal cell lines in their research, reflective of the fact that the grievor is simply opposed to getting the vaccines apart from any relationship they might have to abortion and to her creed.

40. The economic impact upon her family asserted by the grievor is disputed, but in any event is not relevant, submits the Employer, to the question of whether the denial of the grievor's request for an exemption was *prima facie* discriminatory.

41. In addition to many of the authorities referred to by ONA, the Employer referred to *Everall v. Donovan* 2016 CarswellOnt 23086, 2016 HRTO 957, and to various Policy Statements issued by the OHRC and health authorities.

Decision

42. The Employer concedes that the grievor is a devout Roman Catholic and that she is anti-abortion, and that being anti-abortion is part of her faith. It asserts, however, that her decision not to get vaccinated was unrelated to her faith and that her system of beliefs does not suggest or require that she not get one of the COVID-19 vaccines.

43. The seminal case in this area is *Syndicat Northcrest c. Amselem* (2004 SCC 47, 2004 CSC 47 [2004] Carswell Que 1543), a decision of the Supreme Court of Canada.

The Court wrote:

39. In order to define religious freedom, we must first ask ourselves what we mean by "religion". While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

40. What then is the definition and content of an individual's protected right to religious freedom under the [Quebec \(or the Canadian\) Charter](#)? This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom. In *Big M, supra*, Dickson J. (as he then was) first defined what was meant by freedom of religion under [s. 2\(a\) of the Canadian Charter](#), at pp. 336-37 and 351:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

...Freedom means that ... no one is to be forced to act in a way contrary to his beliefs or his conscience.

With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be. [Emphasis added.]

. . .

43. The emphasis then is on personal choice of religious beliefs. In my opinion, **these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make; see, e.g., *Funk v. Manitoba (Labour Board)* (1976), 66 D.L.R. (3d) 35 (Man. C.A.), at pp. 37-38. In fact, this Court has indicated on several occasions that, if anything, a person must show "[s]incerity of belief" (*R. v. Videoflicks Ltd.*, *supra*, at p. 735) and not that a particular belief is "valid".**

. . .

46. To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

47. But, at the same time, this freedom encompasses objective as well as personal notions of religious belief, "obligation", precept, "commandment", custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties. Indeed, the Ontario Court of Appeal quite correctly noted this in *R. v. Laws* (1998), 165 D.L.R. (4th) 301 (Ont. C.A.), at p. 314:

There was no basis on which the trial judge could distinguish between a requirement of a particular faith and a chosen religious practice. Freedom of religion under *the Charter* surely extends beyond obligatory doctrine.

48. This is central to this understanding of religious freedom that a claimant need not show some sort of objective religious obligation, requirement or precept to invoke freedom of religion. Such an approach would be inconsistent with the underlying purposes and principles of the freedom emphasizing personal choice as set out by Dickson C.J. in *Big M* and *R. v. Videoflicks Ltd.*.

49. To require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs in a manner inconsistent with the principles set out by Dickson C.J. in *R. v. Videoflicks Ltd.*, *supra*, at p. 759:

The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. [Emphasis added.]

50. In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

51. That said, **while a court is not qualified to rule on the validity or veracity of any given religious practice or belief, or to choose among various interpretations of belief, it is qualified to inquire into the sincerity of a claimant's belief, where sincerity is in fact at issue:** see *Jones*, *supra*; *Attis v. New Brunswick District No. 15 Board of Education* [1996 CarswellNB 125 (S.C.C.)], *supra*. It is important to emphasize,

however, that sincerity of belief simply implies an honesty of belief: see *Thamas v. Indiana Employment Review Board*, *supra*.

52. According to American constitutional law scholar Professor Laurence Tribe, the jurisprudence in this area evinces that inquiries into a claimant's sincerity must be as limited as possible. He argues that "given the widening understanding of what constitutes religion in our society, the very rights ostensibly protected by the free exercise clause might well be jeopardized by any but the most minimal inquiry into sincerity": L. H. Tribe, *American Constitutional Law* (2nd ed. 1988), at pp. 1245-46. While this was written in the context of the First Amendment to the U.S. Constitution, I believe that it is equally applicable to delimiting the court's role in interpreting religious freedom under the *Quebec (or the Canadian) Charter*. Indeed, the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.

53. Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony (see Woehrling, *supra*, at p. 394), as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices. It is important to underscore, however, that it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static. A person's connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious obligation emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, a court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom.

54. A claimant may choose to adduce expert evidence to demonstrate that his or her belief is consistent with the practices and beliefs of other adherents of the faith. While such evidence may be relevant to a demonstration of sincerity, it is not necessary. Since the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be, it is inappropriate to require expert opinions to show sincerity of belief. An "expert" or an authority on religious law is not the surrogate for an individual's affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.

55. This approach to freedom of religion effectively avoids the invidious interference of the State and its courts with religious belief. The alternative would undoubtedly result in unwarranted intrusions into the religious affairs of the synagogues, churches, mosques, temples and religious facilities of the nation with value-judgment indictments of those beliefs that may be unconventional or not mainstream. As articulated by Professor Tribe, *supra*, at p. 1244, "an intrusive government inquiry into the nature of a claimant's beliefs would in itself threaten the values of religious liberty".

56. Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

(emphasis added)

44. The impact of this decision is that the grievor must demonstrate that she has a practice or belief, that has a nexus with her creed, that calls for a particular line of conduct, here the decision to not get vaccinated, "either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials." To meet the requirement that an applicant must establish a link between the conduct in question and his or her creed, the Court has therefore determined that a "subjectively engendered" personal connection with the divine or one's spiritual faith is sufficient.

45. This decision was considered in some detail in *407 ETR Concession Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada, Local 414 (Black Grievance)* [2007] O.L.A.A. No. 34, 2007 CanLII 1857 (ON LA) (Albertyn). In that Award, the arbitrator wrote:

109. Employees are protected from discrimination on account of their creed. The Grievors' beliefs concerning the Mark of the Beast are part of their religion. The Supreme Court of Canada has extensively addressed the protection of religious beliefs in *Syndicat Northcrest v. Amselem*. Three separate opinions were expressed in the decision, though they all agreed that an essential ingredient of a claim to protection from discrimination on grounds of one's religious beliefs is that the beliefs be sincerely held. So, whatever else, the Grievors must establish that their beliefs are sincerely held.

110. I pose the question, **must the Grievors prove more than the sincerity of their beliefs to establish that the beliefs are religious, and hence covered by the protection from discrimination on grounds of creed? To what extent must the Grievors' beliefs, in this case, objectively conform to the precepts of the Pentecostal church for those beliefs to be protected? These questions were addressed in *Syndicat Northcrest v. Amselem*, above. Two different approaches were adopted by the Supreme Court of Canada: that of the majority (in the decision of Iacobucci J.), and that of the minority (in the decision of Bastarache J.).**

111. **The majority described religion as follows:**

¶39. ... Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

112. **The minority view gave a less subjective description of religious belief.** It said there must be a more definite link between the individual's beliefs and the tenets of a particular religion than the majority expected:

... a religion is a system of beliefs and practices based on certain religious precepts. A nexus between personal beliefs and the religion's precepts must therefore be established. ... Religious

precepts constitute a body of objectively identifiable data that permit a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience. Connecting freedom of religion to precepts provides a basis for establishing objectively whether the fundamental right in issue has been violated. By identifying with a religion, an individual makes it known that he or she shares a number of precepts with other followers of the religion. The approach I have adopted here requires not only a personal belief or the adoption of a religious practice that is supported by a personal belief, but also a genuine connection between the belief and the person's religion. In my view, the only way the trial judge can establish that a person has a sincere belief, or has sincerely adopted a religious practice that is genuinely connected with the religion he or she claims to follow, is by applying an objective test.

. . .

117. **If I had a wholly free choice on these questions, I would prefer the minority's test over that of the majority, when applied to labour relations . . .**

. . .

120. **In my view, the inclusion of creed, rather than individual religious conviction, in the protection s. 5 of the *Code* provides support for the minority decision in *Amselem* over that of the majority. A creed implies some level of association between those of like mind. It contemplates a set of shared beliefs. It implies some professed system of faith, with observances, which can be objectively ascertained. A purely individual belief cannot, I think, constitute a creed; there must be some nexus with others who share the faith. A religious creed involves some shared belief in the Divine. The notion of creed, as compared to individual belief, entails establishing a system of precepts and rules to which the believers jointly subscribe, against which their sincerity and faith can be evaluated.**

121. **Following the approach of the minority, how can it be said that employees have been discriminated against on grounds of their creed when the matter giving cause for the discrimination is not a requirement of their creed? They are not then discriminated against on grounds of their creed, but on grounds of their individual belief.**

122. **The difficulty with the approach of the majority in *Amselem*, to my mind, is that it over-emphasises the purely individual nature of**

religious belief, allowing for an almost unlimited range of individual extrapolation on core religious beliefs. It means that virtually any belief, founded in some tenet of the worker's faith, sincerely held, will trigger the onerous duty to accommodate to the point of undue hardship. The duty will then be borne by the employer, the union and the affected fellow workers. It means that at the front end, the hurdle to secure protection from discrimination for such beliefs will be relatively easily established, and thereupon a very substantial burden will be invoked for those who must accommodate.

(emphasis added)

46. Whether the minority view in *Amselem* is more persuasive, that view did not prevail. The decision of the majority in *Amselem* represents the law, and is to be followed and applied.

47. It is not disputed that the Latin Mass community is an outshoot of or a specific subset of the Roman Catholic Church, and that it has a doctrine and an overarching set of beliefs, and as such is a religion or creed. Members subscribe to a set of principles or requirements that constitute a system of religious-based structures and beliefs that include prohibitions against abortion and contraception, and that forbid members from condoning, cooperating with, or participating in abortions.

48. Although the Roman Catholic Church leadership urges members to get vaccinated and has concluded that doing so would not be condonation of, cooperation with, or participation in abortion, as the Court stated in *Amselem*, the issue initially to be determined does not depend upon what religious leaders suggest or whether an individual's actions are in conformity with the position of religious officials. What is required is a nexus with the religion or creed, a relationship with an overarching system of beliefs of the religion or creed. That is present here, for Latin Mass is opposed to

abortion and contraception. The fact that the Latin Mass community takes the position that each member must as a matter of their own conscience determine whether getting vaccinated is condoning, cooperating with, or participating in abortion does not render the decision merely a preference or a singular belief, separate and apart from the overarching doctrine of the Latin Mass community. The individual decision about what one's faith requires of a member to avoid condoning, cooperating with, or participating in abortion remains a decision about how a member interprets and applies their faith, and has a nexus to the individual's creed.

49. That is not the end of the inquiry. There remains the question of whether the grievor's refusal to get vaccinated is sincerely based upon or connected to her concern that her faith and her relationship with God would be harmed if she were to agree to get vaccinated, or whether her decision to refuse the vaccines is not in fact based upon reasons related to her creed. As the Court said in paragraph 56 of *Amselem*, the issue is whether the grievor "is sincere in his or her belief".

50. There can be multiple reasons for objecting to getting vaccinated, but as long as one of the reasons is sincerely and legitimately based upon one's creed, as subjectively interpreted and applied, an applicant would be entitled to an exception under the *Code* and the vaccine policy itself. Once the grievor learned about the fetal cell line connection with the vaccines, even if that connection is factually and objectively quite remote, if the grievor sincerely believes that her faith does not allow her to get vaccinated, that would be sufficient grounds for granting her request for an exemption.

51. When the grievor first learned years ago about fetal cell lines and their use in developing medicines, she took no steps then to inquire whether the medicines she and her family were then taking had any connections to fetal cell lines, even though these medicines too would be put into their bodies. It is difficult to understand logically, if her faith is the reason she cannot get vaccinated because of the linkage between fetal cell lines and the vaccines, why her faith (as she interprets and applies it) does not also require her to consider whether she can continue to take medicines that may have similar connections to fetal cell lines. Yet it does not appear that she has even yet investigated the particular connections between fetal cell lines and the medicines in issue.

52. Nor is it easy to understand, if her faith prevents her from supporting abortion in using products that utilized fetal cell lines in their development, why the grievor does not also consider administering vaccines that used fetal cell lines in their development to amount to condoning, cooperating with, or participating in abortion. Yet she appears not to have had difficulty with performing such tasks.

53. With respect to the asserted remoteness of the connection between the use of fetal cell lines and the COVID-19 vaccines, the relationship would in fact appear to be quite remote. The lack of a sufficiently close connection is not only supported by the Church's own leadership, including the Pope, for they have concluded that taking the vaccine would not be condonation of, cooperation with, or participation in abortion, but also by the science associated with the making of the vaccines. Nevertheless, Latin Mass condemns abortion and there is a connection, albeit objectively remote, between fetal cell lines and the COVID-19 vaccines. Whether that connection is too remote to amount to condonation, cooperation or participation, or whether the grievor on an objective basis

has unreasonably balanced the competing interests in deciding not to get vaccinated, are decisions for her to make as long as they are based upon her sincere belief in her faith and her sincere belief what that faith requires of her. In light of the Court's direction in *Amselem* that one's sincerely held belief can be subjectively justified, it is not for an arbitrator to provide his or her answers to these questions.

54. The grievor relies on letters from her pastor, one of which states that the grievor's relationship with God would be seriously damaged if she received the vaccine. However, as the pastor did not testify, as the details of what led to the filing of his letters are unknown, as there has been no opportunity to ask any questions of the pastor, and as the issue is about her sincerely held subjective views, I give his letters little weight.

55. Nor are the economic consequences of non-compliance with the vaccine policy material. The economic impact of not getting the vaccine may be relevant to whether an individual is entitled to an exemption on the grounds of creed to the limited extent the circumstances relate to the sincerity of a claim for exemption. Here, whatever the state of the grievor's family income and needs, I am satisfied these factors did not influence her decision to request an exemption or the sincerity of that request.

56. The grievor was less than certain and somewhat evasive about certain matters that related to the sincerity of her decision not to get vaccinated because of her creed, such as her view of the efficacy of the vaccines and whether they actually contained fetal cell lines, or why she had not investigated the use of fetal cell lines in the medicines she and her family took, and in her explanations of why taking the vaccine was contrary to her faith but taking medicines was not. Some of these "inconsistencies" in the grievor's

conduct, discussed above, do raise questions about the grievor's sincerity in claiming that her faith prevents her from getting vaccinated.

57. At the same time, the grievor's testimony must be assessed in context. The grievor has been a devout Roman Catholic for many years, and her faith has formed a major part of her life and motivated and guided her beliefs and her conduct for many years in many aspects of her life. She has for a number of years been a devout and active member of the Latin Mass community, a more traditional and more orthodox subset of the Catholic Church. She has for a number of years conducted herself in a manner consistent with her understanding of Latin Mass doctrine and consistent with her beliefs as to how that doctrine should be applied to her life. Her evidence about her religious beliefs and how she has generally conducted her life according to her faith is credible.

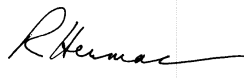
58. Despite the inconsistencies discussed above, it is unlikely that the grievor has fabricated or simply "latched" on to a creed-based claim for an exemption in order to avoid getting vaccinated. It is unlikely that a long-standing devout member of the Latin Mass community has in effect fabricated the assertion that her faith requires this of her. To do so would require a substantial repudiation of the grievor's long-standing system of beliefs and how she exercises her faith.

59. In balance, I consider it more likely that the grievor sincerely believes that to get one of the COVID-19 vaccines would be to act in a manner inconsistent with her beliefs and what her faith and creed require of her, and would in her mind amount to condonation of, cooperation with, or participation in abortion.

60. Since the grievor holds a sincere belief, with sufficient nexus to her creed, that to get vaccinated would interfere with the exercise of her faith and her relationship with the divine, the grievor is entitled to an exemption based on the provisions of the *Code*, on the grounds of creed. It follows that the grievor was *prima facie* discriminated against when the Employer applied its vaccine policy to deny the grievor's requested exemption.

61. This matter is remitted to the parties, and I remain seized of matters arising from this Award, and any matter that has been referred to me.

Dated at Toronto, this 7th day of June, 2022



Robert J. Herman - Arbitrator